IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE M.SASIDHARAN NAMBIAR

WEDNESDAY, THE 28TH MARCH 2007 / 7TH CHAITHRA 1929

SA.No. 417 of 1990(G)

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(A.S.17 OF 1982 OF ADDL.SUB COURT, PARUR
(O.S.536 OF 1976 OF ADDL.MUNSIFF'S COURT, PARUR).

APPELLANTS/ APPELLANTS/PLAINTIFFS:-

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1. SANTHA, D/O. KUMARAN OF PAIKULATH, KIZHAKKEPROM MURI, KOTTUVALLY VILLAGE, PARUR TALUK.

2. UNNAMED MALE CHILD OF THE FIRST APPELLANT(MINOR)\

2ND APPELLANT IS MINOR, REP, BY FIRST APPELLANT MOTHER AS GUARDIAN.

BY ADV. SRI K R THAMPAN

RESPONDENTS IN SA/RESPONDENTS/DEFENDANTS

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1. T.R.VISWANATHAN, S/O. ITTAMAN OF THAIVELIKKAKATHU THATHAPPILLI MURI, KOTTUVALLY VILLAGE, PARUR TALUK. (DIED, LRS RECORDED).

2. NIRMALAL, S/O. ITTAMAN OF DO. DO.

3. PRABHAVATHY, WIFE OF KRISHNANKUTTY OF PONGANKULATH THAIKKATTU KARA, ALWAYE VILLAGE.

4. RATNAVALLY, WIFE OF VISWANATHAN RESIDING AT MUPPATHUPARAYIL, THATHAPPILLY MURI, KOTTUVALLY.

5. KOMALAVALLY WIFE OF RAVEENDRAN OF VELIYATHUVEETTIL EDAYAPURAM KARA, ALWAYE VILLAGE.

6. VALLIKUTTY WIFE OF ITTAMAN OF THAIVELIKKAKATH THATHAPPILLY MURI, KOTTUVALLY VILLAGE. (DIED, LRS IMPLEADED).

**ADDL.RESPONDENTS 7 TO 10**

7. VILASINI VISWANATHAN, W/O, LATE VISWANATHAN P.O. BOX NO.770, P.O. CODE 133, AL-KHUMAIR SULTANATE OF OMAN.

8. JESJU SOMAN, D/O. LATE VISWANATHAN, KOOMULLAMPARAMBU THATHAPPILLY P.O. N. PARUR, 683 520.

9. HEERA SAJEEV, D/O. LATE VISWANATHAN, MAVAMPARA BIL HOUSE, MANNAM P.O. NORTH PARUR.

10. JIJESH, S/O. LATE VISWANATHAN, P.O. BOX 770 P.O. CODE 133, AL-KHUVAIR, SULTANATE OF OMAN.

THE LEGAL HEIRS OF DECEASED R1 IMPLEADED AS ADDL. RESPONDENTS 7 TO 10 AS PER ORDER DTD. 20.3.2007 IN I.A.2438 OF 2006 AND IT IS RECORDED THAT 6TH RESPONDENT DIED AND ALL LEGAL HEIRS ARE ALREADY PARTIES AND NO LEGAL HEIRS ARE TO BE IMPLEADED AS PER ORDER DTD. 20.3.2007 IN S.A.

BY ADV. SRI.K.P.ARAVINDAKSHAN

THIS SECOND APPEAL HAVING BEEN FINALLY HEARD ON 28/3/2007 THE COURT ON 28/03/2007 DELIVERED THE FOLLOWING:

M.SASIDHARAN NAMBIAR, J.

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S.A.No. 417 OF 1990

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DATED THIS THE 28th DAY OF MARCH, 2007

**JUDGMENT**

**Plaintiffs in O.S.536 of 1976 on the file of Munsiff Court, Paravur are appellants. First appellant is the mother and second appellant, her minor child. Respondents are the defendants. Sixth respondent is the mother and respondents 1 to 5 are her children. Apart from respondents 1 to 5, sixth respondent had another son by name, Tyagarajan. The case of the appellants was that Tyagarajan legally married her at her house on 28.12.1974 in accordance with the custom prevailing in their community and on 25.11.1975 while they were living as husband and wife, Tyagarajan died and later second appellant was born on 28.12.1975 to first appellant and Tyagarajan. Appellants contended that plaint schedule property was alloted to the share of Tyagarajan under Ext.A1 partition deed. Appellants instituted the suit seeking declaration of their title to the plaint schedule property as legal heirs of deceased Tyagarajan and for recovery of possession with mesne profits from respondents.**

**2. First respondent filed a written statement denying the contentions raised in the plaint. It was contended that first**

**appellant is not the legally wedded wife of Tyagarajan and second appellant is not the son born to Tyagarajan and there was no marriage as alleged and they were not living as husband and wife. It was also contended that when first appellant become pregnant there was an attempt to settle the paternity of second appellant and on 21.11.2005, Tyagarajan did not reach home as usual and on enquiry it was found that he was being detained by one Paramu at his house and first respondent reached there and found appellants and others attempting to obtain signature in the SNDP register and that attempt was foiled by the timely intervention of first respondent and on 25.11.1975, Tyagarajan on his way to Paravur was taken away by appellants to the Police Station and under threat he was compelled to execute a document and appellants have no right to claim the properties of Tyagarajan and therefore the suit is to be dismissed.**

**3. Learned Munsiff framed necessary issues. On the side of appellants, first appellant was examined as PW1 and a neighbour was examined as PW2. The husband of fourth defendant was examined as PW3. Exts.A1 and A2 were marked. On the side of first respondent, DW1 was examined and Ext.B1 was marked. Learned Munsiff, on the evidence found that evidence of PWs 2 and 3 cannot be believed and their evidence**

**is insufficient to corroborate the evidence of PW1 with regard to the marriage. Learned Munsiff, also found that appellants failed to establish that first appellant is the legally wedded wife and second appellant the son of deceased Tyagarajan and therefore dismissed the suit. Appellants challenged the decree and judgment before Sub Court, North Paravur in A.S.17/1982. The first appellate court elaborately considered the evidence. On re-appreciation of evidence, learned Sub Judge found that evidence of Pws 2 and 3 cannot be believed and evidence of PW1 does not establish any legal marriage or that second appellant is the child born in her relationship with Tyagarajan and therefore confirmed the decree and judgment passed by learned Munsiff and dismissed the appeal. It is challenged in this second appeal.**

**4. This court without formulating substantial questions of law, as per judgment dated 17.11.1997, on reappreciating facts and evidence, allowed the second appeal. It was challenged before the Apex Court in Civil Appeal No.4394 of 2000. The Hon'ble Supreme Court, holding that the concurrent findings of the trial court and first appellate court were reversed without even formulating any substantial question of law, set aside the judgment of this court and remanded the second appeal for fresh disposal after**

**formulating substantial question of law, if any, arising in the case.**

**5. Learned counsel appearing for appellants and respondents were heard. The evidence was also perused.**

**6. The deceased Tyagarajan who admittedly died on 25.11.1975 under suspicious circumstances, is the son of sixth respondent and brother of respondents 1 to 5. The evidence of first respondent as DW1 that deceased Tyagarajan was living with him till his death was not challenged at the time of evidence. Therefore it is to be taken that deceased Tyagarajan was living along with first respondent. The case of appellants was that deceased Tyagarajan married her in in accordance with the custom prevailing in their community, on 28.12.1974 and they were living as husband and wife and second appellant was born in that lawful wedlock. The marriage and paternity of second appellant and the fact that Tyagarajan and first appellant were living together were all denied by respondents. Definitely, burden is on the appellants to establish the legal marriage and that second appellant was born in her relationship with deceased Tyagarajan .**

**7. To prove the legal marriage apart from examining herself as PW1, two witnesses were examined. Learned Munsiff and learned Sub Judge elaborately considered the evidence of**

**each of them and found that their evidence cannot be believed. PW2 was admittedly a neighbour of the appellants. According to PW2, Tyagarajan was residing one and a half kms away from his house. PW2 was examined to prove that he participated in the marriage. Appreciating the evidence of PW2, learned Munsiff and learned Sub Judge found that his case that he was present at the time of marriage cannot be believed. The question is whether there is any reason to hold that appreciation of evidence was not proper and whether any material was omitted to be appreciated or any fact was misappreciated. Being a neighbour if there was a marriage as claimed by the appellants, presence of PW2 at the marriage is quite natural. But while considering the question whether there was a marriage, evidence of PW2 has to be scrutinized in the proper perspective. If the case of PW2 was that he was present at the time of marriage, being a neighbour and being invited by either first appellant or her parents, his case could have been appreciated. But that is not the case of PW2. According to PW2, he was present at the marriage, as he was invited by deceased Tyagarajan . The further examination of PW2 establish that he has no such close contact with PW2. If, in fact the marriage of first appellant was conducted as claimed by appellants, against the objection of family of**

**Tyagarajan and that too when the relatives of Tyagarajan did not participate, this fact would have been definitely known to PW2 and would have been deposed by PW2. On the other hand, as rightly appreciated by courts below, PW2 expressed ignorance about these matters. I find no reason to differ with the appreciation of evidence of PW2 by the courts below.**

**8. PW3 is none other than the husband of fourth respondent. It was argued that evidence of PW3 establishes that first appellant and deceased Tyagarajan had stayed in the house of fourth respondent and PW3 for four days as husband and wife and evidence of a close relative of Tyagarajan cannot be ignored and courts below should have accepted the evidence. Both the courts have given cogent and sufficient reason to disbelieve the evidence of PW3. It was brought out from PW3 that the relationship between first respondent and fourth respondent was strained. Evidence establish that even before Ext.B1 partition relationship was strained. A suit for partition was filed by fourth respondent and after execution of Ext.B1 partition, that case was settled and even thereafter the relationship continued to be strained. It was admitted by PW3 that Ext.B1 petition was filed by fourth respondent against first respondent alleging that an areca tree was cut and damage was caused by first respondent. In such circumstances the finding**

**of courts below that there are sufficient reasons for PW3 to depose against the respondents is perfectly correct. Moreover, evidence of PW3 does not inspire any confidence. Even though PW3 deposed that Tyagarajan married first appellant, he has no case that he was present at the time of marriage. According to PW3, he was told about the marriage by Tyagarajan and that too in January or February 1975, when according to appellants, marriage was on 28.12.1974. PW3 also deposed that he did not even see the deadbody of Tyagarajan. The explanation of PW3 for not attending the funeral was that his presence will be resisted by respondents. That is sufficient to prove that his relationship with Tyagarajan or respondents was not at all cordial. A proper appreciation of evidence of PW3 establish that he cannot be relied on to find either the fact of marriage or the fact that the first appellant and deceased Tyagarajan were living together as husband and wife. Even though PW3 deposed that deceased Tyagarajan along with first appellant stayed in their house, for three or four days after marriage even when examined as PW1 first appellant had no such case. Therefore I find no reason to differ with the appreciation of evidence of PW3.**

**9. Then what remains is only the evidence of PW1. Though PW1 claimed that there was a marriage in accordance**

**with the custom prevailing in their community on appreciating the evidence courts below found that there was no such marriage. Though nothing was mentioned about Ext.A2 marriage agreement between the first appellant and Tyagarajan in the plaint, at the time of evidence it was brought out that Ext.A2 registered agreement was entered into on 25.11.1975. Ext.A2 was executed and registered at 2.50 pm on 25.11.1975. Admittedly, Tyagarajan died on the same day. According to PW1, Tyagarajan died at about 3 pm. Whatever be the time, the fact that his deadbody was found, on the way near a paddy field was admitted by both parties. When examined as DW1, first respondent deposed that he consumed poison and committed suicide. That aspect was also not cross examined. It is true that though respondents challenged Ext.A2 on the ground that it was vitiated by coercion and force exerted by appellants, as no acceptable evidence was adduced in support of that case, courts below rightly rejected that case. Ext.A2 agreement only shows that deceased Tyagarajan and first appellant, on the date of his death, had agreed to live together as husband and wife and not to terminate the relationship except through court or by mutually agreed document. Ext.A2 will not create a legal marriage. If in fact there was a marriage on 28.12.1974, as claimed by appellants,**

**and Tyagarajan and first appellant were living as husband and wife, such a recital would have been shown in Ext.A2. Ext.A2 does not show that before that date, there was any relationship between them or that they were living as husband and wife. On the other hand, Ext.A2 only evidences a decision to live together as husband and wife from that date onwards which is contrary to the case pleaded and sought to be proved. When the entire evidence is appreciated, I cannot agree with the argument of the learned counsel appearing for the appellants that appreciation of evidence by courts below was either perverse or improper warranting interference in exercise of powers of this court under Section 100 of Code of Civil Procedure. I find no substantial question of law involved in the appeal or any merit in the appeal. Appeal is dismissed.**

M.SASIDHARAN NAMBIAR, JUDGE

lgk/-